STATE OF MICHIGAN

COURT OF APPEALS

BETTY DAVIS-WADE, Personal Representative of the Estate of WILLIAM BILL WASHINGTON, Deceased,

Petitioner-Appellee,

v

ROSA M. WASHINGTON-ROBINSON, a/k/a ROSA M. ROBINSON,

Respondent-Appellant.

UNPUBLISHED
October 9, 2003

No. 233829
Wayne Probate Court
LC No. 00-615065-IE

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Respondent appeals as of right from a final order removing her as personal representative, appointing successor co-personal representatives, and admitting her father's ("decedent") will, dated September 23, 1999 ("1999 living trust"), to probate. We affirm.

Respondent first argues that petitioner failed to present any evidence to warrant her removal. Respondent argues that decedent's will, dated October 4, 1988 ("1988 will"), appointing her as administrator and making her sole heir to decedent's estate, was properly filed for probate because decedent effectively revoked the 1999 living trust. We disagree.

"The standard of review on appeal in cases where a probate court sits without a jury is whether the court's findings are clearly erroneous." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* A probate court's decision to remove a trustee is reviewed for an abuse of discretion. *Comerica Bank v Adrian*, 179 Mich App 712, 729; 446 NW2d 553 (1989). An abuse of discretion occurs only when a trial court's decision is " 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.' " *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000), quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999).

The Estates and Protected Individuals Code ("EPIC"),[1] MCL 700.1100 *et seq*., governs the circumstances in which a personal representative may be removed. MCL 700.3611 provides, in pertinent part:

> (1) *An interested person may petition for removal of a personal representative for cause at any time. . . .*
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> * * *
>
> (2) The court may remove a personal representative under any of the following circumstances:
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> (a) Removal is in the best interests of the estate.
>
> (b) *It is shown that the personal representative or the person who sought the personal representative's appointment intentionally misrepresented material facts in a proceeding leading to the appointment*.
>
> (c) The personal representative did any of the following:
>
> (i) Disregarded a court order.
>
> (ii) Became incapable of discharging the duties of office.
>
> (iii) Mismanaged the estate.
>
> (iv) Failed to perform a duty pertaining to the office. [Emphasis added.]

Under the EPIC, MCL 700.2507 governs the revocation of wills:

> (1) A will or a part of a will is revoked by either of the following acts:
>
> (a) Execution of a subsequent will that revokes the previous will or a part of the will expressly or by inconsistency.
>
> (b) *Performance of a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or a part of the will*

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[1] The EPIC replaces the Revised Probate Code, 1978 PA 642, MCL 700.1 to 700.993, and became effective April 1, 2000. 1998 PA 386. Although respondent was appointed personal representative on January 5, 2000, before the EPIC became effective, the EPIC is the applicable act because the matter was pending in the probate court after the EPIC became effective. MCL 700.8101(2)(b) provides, in pertinent part: "The act applies to a proceeding in court pending on that date or commenced after that date regardless of the time of the decedent's death . . . ." See also *In re Smith Estate*, 252 Mich App 120; 126-127; 651 NW2d 153 (2002).

> *or if another individual performed the act in the testator's conscious presence and by the testator's direction.* For purposes of this subdivision, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or a part of the will. A burning, tearing, or canceling is a revocatory act on the will, whether or not the burn, tear, or cancellation touches any of the words on the will.
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> * * *
>
> (3) *The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked, and only the subsequent will is operative on the testator's death.* [Emphasis added.]

Here, the probate court found that respondent presented no credible evidence that decedent intended to revoke the 1999 living trust. Respondent, as the contestant to the 1999 living trust, failed to meet her "burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation." MCL 700.3407(1)(c).

At trial, respondent's evidence did not include an act of express revocation and consisted of (1) decedent's alleged statement, "That piece of paper I signed is not good," and (2) that he turned over in the bed and pulled the blanket over his head after he made the statement. In contrast, petitioner satisfied the mandates of MCL 700.3407 and established "prima facie proof of due execution" of the 1999 living trust. MCL 700.3407(1)(b). Petitioner presented two attesting witnesses, who stated that the will was properly executed. MCL 700.3406.

Petitioner also presented testimony that decedent appeared competent when he signed the document, and testimony of four witnesses that decedent never indicated that he wished to revoke the 1999 living trust. When testimony before the trial court conflicts, this Court will accord great deference to the trial court's assessment of credibility because of its superior opportunity and ability to hear and see the witnesses as they testify. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998).

Further, because the 1999 living trust was a subsequent will that made a complete disposition of decedent's estate, the probate court properly determined that petitioner sufficiently established by clear and convincing evidence that respondent improperly filed the 1988 will and was not entitled to be named personal representative, because the 1999 living trust named Marie Pernell and Ray Washington as personal representatives. As such, the probate court did not abuse its discretion when it removed respondent as personal representative, appointed successor co-personal representatives and admitted the 1999 living trust to probate.

Next, respondent argues that the probate court should not have reviewed the 1999 living trust as evidence, because it was never admitted as evidence at trial. We disagree. Generally, the decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003).

Here, respondent's assertion is not supported by the record. The 1999 living trust was admitted as evidence during the testimony of the first witness at trial. The 1999 living trust was relevant because it was attached to the petition and formed the basis for petitioner's reasons to remove respondent as personal representative of decedent's estate. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401.

Respondent alternatively argues that the probate court improperly admitted the 1999 living trust as decedent's last will and testament. As discussed previously, respondent failed to establish that decedent revoked the 1999 living trust. Additionally, EPIC governs a probate court's review of multiple wills submitted for probate. MCL 700.3407(2) provides, in pertinent part, "If a will is opposed by a petition for probate of a later will revoking the former, the court *shall first determine whether the later will is entitled to probate*." (Emphasis added.) Pursuant to the plain language of MCL 700.3407, the probate court could admit the 1999 living trust after its legitimacy was established. Therefore, respondent has not established that the probate court abused its discretion in admitting the 1999 living trust.

Next, respondent argues that that the probate court had an obligation to review the video tape that she alleged documented decedent's wishes to revoke the 1999 living trust. However, respondent never requested that the probate court admit or view the tape. Unpreserved evidentiary issues are reviewed for plain error affecting a party's substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Respondent cites to no authority that a probate court has a sua sponte obligation to present and admit evidence. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003).

In any event, although respondent asserts that she was prevented from viewing the tape, we note that respondent could have conducted discovery before trial. The court rules provide the opportunity for discovery in probate cases. See MCR 5.131. If respondent wished for the probate court to consider the video tape, she—not the probate court—had the obligation to present her case. Reversible error must be that of the trial court**,** and not error to which the aggrieved party contributed by plan or negligence. *Detroit v Larned Assoc*, 199 Mich App 36, 38; 501 NW2d 189 (1993).

Respondent next argues that the probate court should have dismissed the petition because petitioner's claim was barred by the statute of limitations. Again, we disagree. Respondent relies on former MCL 700.358 in support of her argument. However, as mentioned previously, MCL 700.1 to 700.993 was repealed and replaced with EPIC. MCL 700.3611(1) does not impose a time limit on petitions seeking to remove the personal representative. Further, affirmative defenses relying on a statute of limitations must be raised in the first responsive pleading. MCR 2.111(F)(3), *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239; 615 NW2d 241 (2000). Generally, an affirmative defense which is not properly pleaded is waived. MCR 2.111(F)(2), *Citizens Ins Co v Juno Lighting, Inc*, 247 Mich App 236, 241; 635 NW2d 379

(2001). We conclude respondent has waived this issue because she asserted a statute of limitations argument after trial, well beyond her first responsive pleading.

Next, respondent argues that the probate court improperly admitted the 1986 will to probate. The record indicates that the probate court may have made a clerical mistake when it entered the April 16, 2001, order admitting the 1986 will instead of the 1999 living trust. However, pursuant to MCR 2.612(A)(1), a trial court is allowed to correct a clerical mistake "at any time." The purpose of MCR 2.612(A) is to make an order accurately reflect that which was actually done and decided by the trial court. *McDonald's Corp v Canton Twp*, 177 Mich App 153, 159; 441 NW2d 37 (1989). Because the corrected order is in the lower court file respondent has not established that the probate court improperly admitted the 1986 will.

In respondent's next claim of error, she argues that the probate court exhibited bias on the basis of several adverse rulings. We disagree. Absent a showing of actual personal bias or prejudice against either a party or the party's attorney, a judge will not be disqualified. See MCR 2.003(B)(1); *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). "A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich App 232, 237; 657 NW2d 147 (2002). In our review of respondent's claimed instances of bias, we conclude that respondent has not presented any evidence of actual bias and has failed to rebut the presumption that the probate court was fair and impartial. It is well established that adverse rulings alone are insufficient to disqualify a judge. See *Gates, supra* at 440.

Next, respondent argues that the probate court lacked the authority to order her to prepare an accounting, because decedent's estate was unsupervised. We disagree, because once the probate court removed respondent as personal representative, the probate court had the authority to order an accounting. MCL 700.3611(1) provides, in pertinent part:

> Except as otherwise ordered under section 3607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or preserve the estate. If removal is ordered, the court *shall* also direct by order the disposition of the property remaining in the name of, or under the control of, the personal representative being removed. [Emphasis added.]

Therefore, pursuant to the plain language of MCL 700.3611, once the probate court made the determination that removal was warranted, the probate court was required to order respondent to provide information regarding the status of decedent's estate. This is particularly true where respondent provided no specific information at trial regarding the expenses that she paid on behalf of decedent's estate, and respondent admitted that she did not pay decedent's funeral expenses. See also MCL 700.1302; MCL 700.3602.

Respondent argues that the probate court wrongly charged her with contempt of court when she failed to file a copy of the accounting to petitioner's attorney. Respondent has failed to properly present this issue for appellate review by failing to establish that she was actually found to be in contempt of court. The contempt hearing was originally scheduled for pretrial on August 14, 2001, but the lower court record indicates the hearing was rescheduled twice. Further, there is no indication that a contempt hearing was held, and despite this Court's request

for all transcripts, respondent has not submitted a transcript for a contempt hearing or a court order holding her in contempt from the probate court. An appellant must file all transcripts in the lower court file. MCR 7.210(B)(1)(a); *Myers v Jarnac*, 189 Mich App 436, 443-444; 474 NW2d 302 (1991), citing *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 414; 425 NW2d 797 (1988). This Court will refuse to consider issues for which the appellant failed to produce the transcript. *Id.* at 444.

Lastly, respondent, in an unpreserved issue, argues that she is entitled to costs and punitive damages. We disagree. As a general rule, attorney fees are not recoverable either as an element of costs or damages unless allowance of a fee is expressly authorized by statute, court rule, common-law, or contractual provision. *Grace v Grace*, 253 Mich App 357, 370-371; 655 NW2d 595 (2002). Attorney fees may not be awarded based solely on equitable principles. *In re Adams Estate*, 257 Mich App 230, 237; 667 NW2d 904 (2003).

MCL 700.3715(x) provides that "a personal representative, *acting reasonably for the benefit of interested persons*, may . . . [p]rosecute or defend a claim or proceeding in any jurisdiction for the protection of the estate and of the personal representative in the performance of the personal representative's duties." (Emphasis added.) MCL 700.3720 provides, "If a personal representative or person nominated as personal representative defends or prosecutes a proceeding in good faith, whether successful or not, the personal representative is entitled to receive from the estate necessary expenses and disbursements including reasonable attorney fee incurred." Where the attorney fees are incurred in defending an action challenging the personal representative's performance of duties, those fees are properly chargeable against the estate where no wrongdoing is proved. *In re Hammond Estate*, 215 Mich App 379, 387; 547 NW2d 36 (1996).

Here, respondent may not recover attorney fees, because she did not defend the action in "good faith." Respondent was, in part, responsible for the litigation, because she filed the 1988 will for probate. "[W]here the fiduciary was partially to blame for bringing about unnecessary litigation, the fiduciary rather than the estate should be responsible for the attorney's fees." *In re Valentino Estate*, 128 Mich App 87, 95-96; 339 NW2d 698 (1983).

Similarly, respondent is not entitled to punitive damages or damages for emotional distress, because they are not provided for in the EPIC. See *Grace*, *supra* at 370-371. Finally, not having prevailed in full, respondent is not entitled to recover costs on appeal. MCR 7.219(A).

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra